No. 7010

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Brief of Appellee

PHILIP SAVARESY,
Billings, Montana,
GEORGE S. SMITH,
Billings, Montana,
Attorneys for Appellee.

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In view of the fact that the principal contention of the appellant is that the Trial Court erred in denying its motion for a directed verdict, we believe that this Court will be materially assisted by a statement of facts based upon the evidence, with citation to transcript pages, and, therefore, beg leave to make such statement, although in doing so there may be some repetition of facts interspersed throughout appellant's argument.

And with reference to the facts that are set forth in appellant's brief, we believe it only fair to point out that no attempt has been made by appellant to set out the full con-

text of the evidence or meaning of any witness, but has seized upon different sentences appearing in the evidence, omitting other sentences, and combined those selected, in such a way as to give plausability to its argument. We make no complaint of this method of presentation, and mention it here only in order that the Appellate Court will understand that we do not agree with the fact conclusions set forth in appellant's brief.

STATEMENT OF FACTS.

The evidence shows that the appellee enlisted on July 28, 1917 and was discharged on December 22, 1918; that his life prior to enlistment was that so common to many young Americans—some attendance at high school, a short course in bookkeeping and typewriting, coupled with employment as a steel worker, boiler maker, harvest field hand and with some restaurant work, and that he was a healthy person. (Tr. p. 13-14.)

He arrived in Europe in December, 1917, at which time he was granted War Risk Insurance in the sum of $10,000 (Tr. pp. 14 to 16).

His duty took him to the front lines in January, 1918, and he was almost continuously on the front, with periods in rest area, until the date of his wound on May 10, 1918. (Tr. p. 17.)

On the evening of May 10, 1918, he was detailed as a guide, taking men in and out of the trenches, and while advancing toward the trenches, he was hit by high explosive. Although feeling the burn when hit, but not realizing he was wounded, he endeavored to push on, placed his hand inside his shirt and feeling blood, he reported to

Sergeant Rogers, and was sent back in care of Higgins and before reaching the regimental infirmary he had become so weak that Higgins was almost carrying him. (Tr. p. 17-18.)

This marked the commencement of his experience in the army hospitals, which continued until the time of his discharge. (Tr. p. 18.)

He was evacuated with other wounded, receiving serum to prevent blood poisoning, lost track of time and place, and finally reached a French base hospital, where he received his first operation. (Tr. p. 18-19.)

From there he was taken to Military Red Cross Hospital No. 1, Paris, where he stayed about ten days, and from there to Base No. 34, Nantes, France, where he was operated on under ether about six times, and had many operations and probings under local anaesthetic. His wound developed a pus condition, and incisions were made in his back and under his arm for probing and for treatment with Dakins solution. His experiences in the hospital are related by him in simple but graphic language, which depicts a time of anguish and pain—repeated dressings with attendant pain, probing for the shrapnel, continued fever, with a wasting away of his body, until he was down to skin and bones, frequent hemorrhages that called for more probing with instruments to reach the ruptured arteries and veins, coughing spells, a bed in the ward termed "Death Ward," in which only serious cases were cared for, until finally he was so weakened that it was necessary to give him a blood transfusion, followed immediately by an operation, which resulted in extracting the shrapnel from his

body on August 10, three months after he was wounded in action. (Tr. p. 19-20; Tr. p. 64-65.) The shrapnel entered from the front and was taken out in the back. He had tubes for Dakins solution in two places in the back, one under the arm, and one in the wound in front. (Tr. p. 21.) He remained in hospital until a day or two before his discharge. (Tr. p. 22.)

The nature and severity of the wound and the attendant treatment are disclosed by the scars which he bears upon his body. The best description of these scars appears in the testimony of Dr. Louis W. Allard, at pages 122 and 123 of the transcript.

The service record of the appellee prepared at the time of his discharge (Tr. p. 23-27) indicates that the examining surgeon and the board of review recognized the serious nature of his wound, as the statement is contained therein that the wound was likely to result in death or disability, and at that time he was rated 30% disabled.

The appellee's after-war history falls into three natural divisions: before Vocational Training period, Vocational Training period, after Vocational Training period; and the latter period is distinguished by his experiences as an employee of the Ferndale cafe and as an employe of other establishments.

As before stated, he was discharged on Dec. 23, 1918, and went to his father's home, where he stayed until April or May, 1919, during which time he was rated as totally disabled for compensation purposes, and ever since he has received compensation with rating varying from 20% to total, at the time of the trial the rating being 66%, and he

has been in government hospitals at least four times since his discharge. (Tr. p. 28.)

In April or May, 1919, he tried to work at the Wide Awake cafe at Ft. Smith, Ark., as a waiter, but not with full duty as he was not permitted to do table work, due to the fact that he could not carry the loads, and not feeling good, he left this job, after notifying the Veteran's Bureau. (Tr. p. 28-29.) A significant feature in connection with this employment is Exhibit C (Tr. p. 44) introduced by the appellant, an employment statement of the appellee, in which the statement is made that he will stop work at the Wide Awake cafe about the first of the month for lighter work, as the work he was doing was too heavy, this statement being made at a time when appellee could not have been thinking of insurance payments.

We next find him employed at the Albin cafe in Cheyenne for five days during a rodeo, and at a time when there was need of extra help. (Tr. p. 29.)

Before enlisting he had been employed at Miles City by Jim Peterson, and he was again employed there after his discharge, where he continued to work for six weeks to two months, but his work was not satisfactory as was demonstrated by the fact that Jim Peterson sold the cafe, and although all the help was retained, the respondent was discharged within two or three days by the new proprietor. (Tr. p. 29.)

The Ingham cafe at Miles City needing some one on the job during the afternoon, when work was very light, the appellee was given the position and remained there for a month or six weeks, when he entered Vocational Training.

(Tr. p. 30.)

Vocational Training was not satisfactory to the government or the appellee. (Tr. p. 30-34.) He was placed at the Bozeman State college in bookkeeping, typewriting and accounting (it will be remembered he had some study in these subjects before the war); in a short time he was taken off typewriting and continued with bookkeeping, but he was unable to make any progress, although he had considered himself a good student before the war. His training was soon changed by the Vocational Board to baking, first being sent to the Purity Bread company at Billings, where his duty consisted mostly of observation, and from there to the Dunwoody school at Minneapolis. At this school he was unable to do any of the chemical work, and his work consisted mostly of experiments with small quantities of material, the laboratory work not being done with any results. He has never received a certificate from the school, as he was unable to get the actual baking experience necessary. After leaving the school, the board placed him with the Nichols bakery at Billings, and immediately his physical incapacities were manifested. The bench work was too heavy; after doing a day's work, he found it necessary to go to his hotel room where he would throw himself upon his bed and lay there until the next morning, frequently with nothing to eat and without undressing. The Bureau again changed his objective to restaurant work, and he was placed first at the Metropolitan cafe and later at the Main cafe, where he completed his Vocational Training. He tried to work during his training at the Main cafe, but was not successful and he was not permitted to do anything

and finished his training in observation work.

After finishing his Vocational Training, his history is that of steady employment at the Ferndale cafe in Billings on two different occasions for quite long periods of time, with many attempts to work and many discharges when not employed at the Ferndale.

Thus his first employment was as a cook at Shelling's cafe for about two months in Dec. 1922 and January 1923. He was unable to perform his duties, could not do any lifting, could not stand the heat of the range, had fainting spells and was aided by the proprietor and other employees and was finally discharged. (Tr. p. 34-35.) He is corroborated by Mr. Shelling, the proprietor (Tr. p. 67-68) and Mrs. Velma Dugan (Tr. p. 77-78) one of the employees, who at times did part of his work.

We next find him at the Metropolitan or Luzon cafe in August and September, 1923, during the rush fair period (Tr. p. 35), not having been able to do any work from January to August.

A period of idleness followed until January, 1924, when he secured employment at the Ferndale cafe, and continued in that employment for about two years and eight months.

J. H. Daniels, secretary of the Cooks and Waiters union, testified (Tr. p. 79-80) that the Ferndale cafe is a small cafe, that the work is considered a small job, and that the witness would not recommend the appellee for work at a larger place, and with this condition in mind it is interesting to note appellee's work at the Ferndale.

Thus hard work had to be done by some other employe, who ever happened to be on shift with appellee did this

kind of work. (Tr. p. 35.) Appellee had duties requiring heavy lifting. It was done by calling some other employee who could do it, or by leaving it to the next shift. Appellee was troubled with faintness, drawing under the heart, by a catch in the neck, which made him sick; these spells incapacitated him from work, and he would have to sit down or lay across a table or bed, the spells lasting from five minutes to half an hour, and during these spells the work would pile up or be done by some other employee, and he was finally discharged. (Tr. p 36-37.) Frank Buckley (Tr. p. 74-76), Mrs. Velma Dugan (Tr. p. 77-78), and Mrs. Flora Summers (Tr. p. 78-79), who were employed with appellee at the Ferndale, all corroborate his testimony in this respect, and testified that they helped him in the performance of his tasks, Buckley explaining (Tr. p. 75), "I did it because Carl needed the work, he was a good fellow and he had a family and he needed to do it to keep his family going."

After his discharge from the Ferndale, he was employed at the Metropolitan for a short time through the fair with the same experiences as at the Ferndale. (Tr. p. 37.)

He then went to the New Bungalow in September or October, 1926, where special arrangements were made, like building high tables, to assist appellee. His experiences there were similar to the Ferndale. Frank Larson, manager, (Tr. p. 70), corroborates appellee, and states that he did not have any endurance, and while a good man when starting the shift around 6 or 7 in the morning, by 7 or 8 he got tired and it would seem he would die on the shift, and after trying him for about six weeks, he had to turn

him loose.

Appellee was then idle until May 17, 1927, when he secured employment at the Northern hotel (Tr. p. 37), where he had fainting spells, the work was too heavy, he could not stand the heat from the boiler, and he had to go to the hospital at Helena. T. C. Peterson, chef, (Tr. p. 71-73), corroborates appellee, and states he had dizzy or fainting spells, that he had to be helped outside five or six times, and it would be about two hours before he got back on the job, that appellee was useless in lifting heavy articles, and that when appellee returned from the hospital he would not take him back.

Appellee returned to the Ferndale in July, 1927, (Tr. p. 38) and had the same experience as at the time of his first employment there, staying there until April, 1931, when he quit, "because I had gotten in such shape that I couldn't get along with any one—was in a nervous condition. I dreaded to go to work, and when I would leave, I would go home and go to bed, and maybe never leave the house until it was time to go to work the next morning, and maybe something would upset me, and I would go all to pieces, and so I just quit. I knew Mr. Loomis was dissatisfied with my work." James Buckley (Tr. p. 74-76) and Mrs. Flora Summers (Tr. p. 78-79) also worked with appellee at the Ferndale during this period and corroborate his testimony.

After leaving the Ferndale, he was employed at Carlin's cafe for a month and a half, being discharged on account of inability to do the work, was at Byron's cafe for six days and was discharged on account of inability to do the work (Tr. p. 38); worked at the Big Timber cafe

during a rush season, being helped all the time by the proprietor (Tr. p. 39); ran a lunch counter at the sugar factory, employing all help (Tr. p. 39); was employed at Casey's at Laurel during a tournament, being helped by Mr. Casey (Tr. p. 39), and at the time of the trial was at the Billings Golf and Country club, not doing any work, but hiring all work done. (Tr. p. 39.)

To briefly summarize his evidence, as corroborated by others, it shows a history of inability to hold a position before his entry into Vocational Training, repeated changes of objective by the Vocational Board during his training period, and casual employment and repeated discharge after Vocational Training, except at the Ferndale cafe, where he was enabled to handle his job only by reason of the good natured help of his fellow employees, and at that place he was discharged once and forced to quit the second time on account of his physicial and nervous condition.

Before referring to appellee's testimony relative to his physical and nervous condition during these years, it is well to direct the court's attention to the testimony of Edward M. Shelling (Tr. p. 69), Frank Larson (Tr. p. 71), T. C. Peterson (Tr. p. 72) and James Buckley (Tr. p. 76), all experienced restaurant men, who testified that the appellee was unable to handle the job without assistance from others, and it is also pertinent at this time to point out that his experience in Vocational Training demonstrated that he was not fit for sedentary jobs; in short, he was not fit for either active or inactive employment.

Appellee testified that since his discharge his condition has been bad—nervousness, aching in the left arm and mus-

cles down into the palm of the hand, catches in the wound, spells that do not render him unconscious, but which compel him to lie down and render him weak and nervous and cause him to sweat, catches in the neck, the attack being accompanied by dizziness and drawing pains in the heart, which leave him sick and weak; that these attacks have been continuous since his discharge (Tr. p. 39-40); forgetfulness, which has hindered him in his restaurant work (Tr. p. 41); that his life has consisted largely of work and going home to bed, with little social recreation (Tr. p. 41); that his condition has been getting worse since his discharge (Tr. p. 41); that he has consulted with doctors almost continuously and been advised not to work, but that he has been unable to stop work, as he has a family to support, and his income has never been sufficient to support his family without work. (Tr. p. 41-42.)

Mrs. Francis, wife of the appellee (Tr. p. 65-67), corroborates him as to need of rest after a day's work, little social recreation, suffering, and the fact that the necessity of supporting the family has spurred him on to work.

Appellant's counsel, by cross examination of appellee, endeavored to show large earnings by appellee from the date of his discharge, and directed questions to appellee (Tr. p. 62) indicating that counsel's computation showed that in twelve years' time the appellee had lost twenty-five months, out of which time he had spent possibly six months in bed, to which question the appellee answered that was possibly correct, but that he could not say positively, as he had not given any thought to the matter; counsel thereupon propounded a further question based upon counsel's com-

putation that appellee had worked ten years, or one month less than ten years, said work including the time in Vocational Training, and that counsel's computation showed earnings between $15,000 and $16,000, including vocational training pay, to which appellee answered yes.

It is readily apparent from the transcript, however, that appellee's answers, fairly construed, meant that if the computation of appellant's counsel was correct, that he agreed with said computation.

However, a check of the record in this case shows a much different situation.

The record of work is to be found in appellee's testimony (Tr. p. 28-38) and in appellant's exhibit F (Tr. p. 49-54), this exhibit being an Industrial History Affidavit, which had been executed by the appellee at some time prior to the trial. It is to be noted that there is no marked difference between appellee's testimony and this affidavit.

Taking the period from Dec. 23, 1918 to April 1, 1931, when appellee last left the employe of the Ferndale cafe, the approximate number of weeks amounts to 637.

Reducing the work period to terms of weeks it shows approximately as follows:

Wide Awake cafe, Fort Smith, 6 weeks;
Albin cafe, Cheyenne, 5 days;
Jim Peterson, Miles City, 6 weeks;
Ingham cafe, Miles City, 10 weeks;
Shelling's cafe, Billings, 8 weeks;
Luzon cafe, Billings, 8 weeks;
Ferndale cafe, Billings, 131 weeks;
Metropolitan cafe, Billings, 10 days;

New Bungalow cafe, Billings, 5 weeks;

Northern hotel, Billings, 9 weeks;

Ferndale cafe, Billings, 191 weeks.

A total of 374 weeks, 15 days, approximately 376 weeks.

So that the record shows that out of approximately 637 weeks to April 1, 1931, appellee was idle approximately 130 weeks, in training approximately 131 weeks, and working approximately 376 weeks.

But it is to be remembered that he was only able to do this work by reason of the aid given him by other employes, and in addition appellant's counsel developed on this cross examination (Tr. p. 60-61) that quite often appellee was forced to employ some person to finish out his shift and to pay for this work out of his own funds, which appellee estimated amounted to as much as a month out of the year.

And taking the period from April 1, 1931 to the date of trial, as shown by the appellee's testimony (Tr. p. 38-39), a period of approximately 61 weeks, appellee was able to work six weeks at Carlin cafe, six days at Byron's cafe, several weeks at Big Timber cafe, ran a lunch counter at the sugar factory, having all work done, had a few days' employment at Casey's at Laurel during a tournament, and was at the Golf club at the time of trial, hiring all work done, in short not able to hold gainful employment much more than 10 weeks out of 61 weeks.

Appellee introduced the testimony of three doctors—Dr. Ferris Arnold (Tr. p. 81-85), Dr. Robt. J. Hanley (Tr. p. 85-89), and Dr. John L. Treacy (Tr. p. 90-98), the first two having attended appellee and the last named being called to testify as to his conclusions based upon all the evidence in

the case.

Appellee consulted with Dr. Arnold during the period from 1921 to 1926, and the witness gave a diagnosis of chronic myocarditis, enlargement of heart, chronic nephritis, chronic respiratory infection, neurosis and extreme mental despondency, shortness of breath, pulse 120, 140 on exertion, low specific gravity urine, rales in chest, casts and albumen in urin, chronic cough, temperature from 100 to 103, weakness and inability to do his work, (Tr. p. 82.); gave it as his opinion that the condition was due to the wound received in action, that in his opinion appellee was permanently and totally disabled in accordance with the Treasury Department definition (Tr. p. 83), that such permanent and total disability dated back to the date of the wound and would continue throughout the life time of the appellee (Tr. p. 83-84), and that in his opinion the appellee was not in fit condition to work, and the work he did had a tendency to further impair his health.

Dr. Hanley, who treated appellee from 1926 to date of trial, corroborates Dr. Arnold in all material particulars, and he refers to the fact that at the time of the trial, appellee looked better than at any time he was observing him, ascribing his then condition to the fact that he had not been engaged in any hard work for some time. (Tr. p. 86.)

Dr. Treacy, who is consulting surgeon for the Veterans' Bureau, heard all of the evidence in the case, gave a diagnosis similar to that of Dr. Arnold and Dr. Hanley, gave it as his opinion the appellee was totally and permanently disabled in accordance with the Treasury Department definition; that the disability resulted from and dated back to

the time of the wound and would continue for the life time of appellee, testified his condition was such as could be produced by the injury received in action, and that the pus condition of his lung after the injury was capable of causing the heart condition and the kidney condition, and that the only treatment for the condition was and is complete rest, and that the work he had done had a tendency to further impair his health (Tr. p. 90-98); on cross examination (Tr. p. 95) the witness refers to Dr. Hanley's testimony that the appellee was in better shape at the time of the trial than usual because of the fact that he had not been engaged in hard work for some time.

The appellant's case consisted largely of evidence of physicians, who had made one or more examinations of the appellee.

Dr. Wm. H. Fortin (Tr. p. 99-107) testified to one examination on March 3, 1926, and his diagnosis of the condition being chronic fibrous pleurisy and fibrosis of left upper lobe, states that no heart condition was found, that the heart beat was regular, no murmurs, blood pressure 112-78, and that there was no urinalysis of record, so he could not testify to the kidney condition (Tr. p. 99-100); states that the only condition that would handicap appellee from following his occupation as cook or waiter was the injury or the scar tissue which formed at the side of the injury (Tr. p. 103); on cross examination (Tr. p. 106), stated he would require several examinations to get a picture of the pulse rate, that he had only examined appellee once, that the pulse is not recorded, if anything abnormal it would have been recorded, that the blood pressure was not abnormally

low, although he admits (Tr. p. 107), that at the age of 32, that being appellee's age at the time of the examination, the normal rate would be 120-80 or it might be up to 125 or 130, his testimony on direct being that the pressure in this instance was 112-78.

Dr. James I. Wernham (Tr. p. 107-111), testified to appellee's complaint to him, described the conditions found, states the pulse rate was 88 sitting, 112 standing, blood pressure 120-78, that the outer edge of the heart extended further to the left than normal, which would be either due to enlargement of the heart itself or due to scar tissue drawing it over; that the fact of the difference in pulse rate in sitting down and standing showed weakness of the heart; that his condition would probably handicap him from some of his duties, that his strength was impaired; and on cross examination testified that the heart was not normal, that he found a myocardic insufficiency, which should be treated by not over exertion, the only treatment being rest, and that while he found no albumin in the urine, it was not conclusive that it was not present, as it would appear some times and not other times.

Dr. Marcus H. Watters (Tr. p. 114-119), physician for the Veterans' Bureau, described an examination on June 28, 1927; states that an examination and diagnosis was made by a specialist in nervous and mental diseases due to appellee having neuritis of the left ulnar and median nerves (Tr. p. 115), (the government did not produce the specialist who made this diagnosis). The witness further stated that the physical examination and X-ray showed a fibrosis in the upper lung, and a diagnosis of pleurisy, (the govern-

ment failed to produce the X-ray). Witness further stated the appellee was in hospital from May 27, 1927 to July 10, 1927 (Tr. p. 115), that there was no disability of the heart, although he testified that the pulse rate on admission was 90, on the second day it was recorded as 100, in the afternoon of the same day 80, and with the exception of a few slight declines in the pulse rate for the next week, it did not reach higher than 90, and the average pulse rate was 85 (Tr. p. 116); (Dr. Fortin had testified (Tr. p. 105) that the normal pulse rate is 70 to 80); that the neuritis or inflammation of the left ulnar and median nerves would prevent appellee from following the occupation of cook or waiter, and also the atrophy of the shoulder muscles and consequent atrophy of the muscles of the left arm (Tr. p. 116-117); and then on suggestion from government counsel, changed his statement and said it would not prevent but would handicap appellee, then explained it would all depend upon what the man was doing. On cross examination, he said that with the assistance of others in performing parts of his duty, appellee could follow the occupation of cook; that his heart condition might have developed under the strain of work, and that the pus condition at the time of the injury could possibly produce a heart condition that might eventually develop into heart trouble.

Dr. J. H. Bridenbaugh (Tr. p. 111-113 and Tr. p. 119-120), testified to taking of X-ray pictures, that the X-rays showed no trace of injury to the lung; that if it was a penetrating wound, the resulting disability **might be evidenced** by the X-ray (Tr. p. 112), and that the X-ray **would not necessarily** show any myocardiac insufficiency. (Tr. p.

120.) (Emphasis is ours.)

Dr. Louis W. Allard (Tr. p. 121-125) testified to an examination on January 15, 1924, described the nature of the scars on the body of appellee (Tr. p. 122-123), states that if shrapnel penetrated the chest wall, there would have been something in his notes (Tr. p. 123), but on cross examination (Tr. p. 124-125), after his attention was directed to the fact that the shrapnel entered from the front, was extracted from the rear, and that the scar under appellee's arm was due to an incision for probing purposes, stated that a missile usually takes the straightest line, and that it would have to go through the chest wall, but that it was possible it could have followed the tissue plane; that the fact of empyema or pus condition at the time of the wound suggested a penetrating wound, and the fact that appellee spat blood immediately after the injury also suggested a penetrating wound.

Appellant also introduced the evidence of three lay witnesses: A. M. Loomis (Tr. p. 126), proprietor of Ferndale cafe; Mrs. A. M. Loomis (Tr. p. 128), wife of proprietor, and Charles E. Richstein (Tr. p. 130), foreman of Purity Bread Co.

The testimony of Mr. and Mrs. Loomis shows that the kitchen work was performed satisfactorily, Mr. Loomis (Tr. p. 128) stating his duties were mostly in the front of the building, and Mrs. Loomis (Tr. p. 129) stating that she knew others helped appellee lift stock pots, that appellee complained of feeling unwell, that he always spoke of being tired and not feeling well, that he was dependable and she could depend on him being on the job, and the work was

gotten out, and that was all she was concerned with, that if it hadn't been for the fact that the work was gotten out at all times, she would not have been able to keep him there, and if other employees helped him to do portions of his work, there was no objection on her part.

From the analysis of this evidence, it is apparent that Mr. Loomis' duties were mostly in the front, greeting customers, while Mrs. Loomis supervised the details of the work, including the kitchen work, and she indicates in her evidence that the testimony given by the appellee and other employes in the kitchen was a correct recital of the facts.

And the evidence of Mr. Loomis suggests that there may have been some resentment on his part toward appellee by reason of the fact that appellee suddenly quit his employ, his explanation (Tr. p. 128) being:

> "Then he worked for me up to the spring of 1931, at which time he just quit. I think he did not give me any reason for quitting. He said he believed he would quit. I said, 'All right.' "

In short, it seems strange that a trusted and valued employee would be permitted to quit without explanation or any attempt whatever to get him to reconsider his decision —the very circumstances would suggest that everything was not as agreeable as Mr. Loomis pictures in his testimony, and that there may have been some feeling of relief that the appellee had quit. However, the jury are the judges of the credibility of witnesses and the weight to be given to testimony, and the standing of a witness in the community, his demeanor on the witness stand and manner of testifying may be such that the jury are justified in

placing little credence on his testimony, and there is nothing in the record to show that the jury was not justified in disregarding the evidence of Mr. Loomis.

The testimony of Mr. Richstein (Tr. p. 130) has little probative value. The appellee was there in vocational training, and the witness paid little attention to him, did not know that the government placed him there for training, did not know whether he had any duties around the shop as a vocational training student, was not his immediate supervisor, and could not tell how much work the appellee did in a day.

ARGUMENT.

The contention of appellant is that the trial court erred in denying motion for directed verdict made at the close of appellee's case and again of appellant's case, said motion being based on the ground that there was no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the complaint or at any time. (Tr. p. 98 and Tr. p. 131.)

The rule in this Circuit, as well as in all Circuits, is that the court may not weigh the evidence, that if there is substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.

The rule is aptly stated in United States v. Burke, 50 Fed. (2d) 653, 656, a case involving War Risk Insurance appealed to this court from Washington, as follows:

> "Under the settled doctrine as applied by all federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question

thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

"And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. (Citing cases.)

"The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. (Citing cases.)

"Again, such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict." (Citing cases.)

The question of total disability is a relative one and depends upon the particular facts in each case. To quote from United States vs. Rasar, 45 F. (2d) 545, 547, an appeal to this court from Washington:

"Total disability is not an abstract concept. It is not the same in all circumstances and under all conditions. It is a relative term, and whether it is present

in a particular case depends upon the peculiar facts and circumstances of that case. The problem of determining whether it exists in a given case is concrete and relative—not abstract."

This court has considered many cases similar to the present one, and the rule to be applied herein has been definitely determined.

Thus, in United States v. Sligh, 31 F. (2d) 735, appealed to this court from Arizona, and one of the first cases to come before this court, the opinion contains the following apt quotation:

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for disabled person to follow continuously any substantially gainful occupation.
>
> "Facts that during major part of period appellee was receiving a substantial salary is material, but not conclusive. Aside from consideration that testimony tended to show that employer was moved by sentiment and sympathy, fairly construed, the policy is to be understood as meaning not present ability in an absolute sense, but a capacity that may be legitimately exercised; that is without serious peril to the life or health of insured. * * * had appellee put aside concern for the immediate necessities of his family and yielding to advice of conservative physicians, wholly refrained from work, it may be doubted whether any question would have been raised of his right to receive insurance."

And in this case, if Francis had heeded the advice not

to work given by his physicians as early as 1921 (Tr. p. 84), there can be little question as to a determination of total disability, but Francis, just the same as Sligh, was faced with the necessity of supporting a family, without thought to the effect of work upon himself.

The case of United States vs. Meserve, 44 Fed. (2d) 549, appealed to this court from Oregon, is one wherein the appellee worked as a brakeman for twenty-six months, making $5,275.00, during which period he did considerable over-time work, but the evidence showed that everything possible was done by his wife and fellow railroad laborers to make it possible for him to earn a living, being assigned to the easiest run available, given the lightest task on his train, with his fellow workers performing a large portion of his tasks. The following pertinent quotations are taken from the opinion of the court:

> "Total disability is any disability of mind or body which renders it impossible for a disabled person to follow continuously any substantially gainful occupation, and such disability is deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The principal insistence of the appellant is that the unchallenged work record of the insured after his discharge from the service shows conclusively that Meserve was not permanently and totally disabled until long after the expiration of his insurance. * * * From the record before us, however, it will not do to consider this proof abstractly, but there must be taken into consideration additional facts and circumstances which we

> believe shed material light upon the actual condition of the insured. The question is not what the railroad company's pay roll shows; it is what was the physical condition of the insured at the time. The record facts have no mysterious convincing force which foreclose their being explained and ameliorated by the proof of attendant and surrounding circumstances and conditions."

It is to be noted that the present case in many respects is similar to the Meserve case—thus the only place where appellee was able to hold any protracted employment was at the Ferndale cafe, which, according to the testimony of Mr. Daniels, secretary of the Cooks & Waiters union, was one of the smaller cafes in town, and even for appellee to hold employment there it was necessary for fellow employes to do a large part of his work, even at times taking over the work in its entirety because of the fact that appellee was laid out by fainting and dizzy spells.

United States vs. Lawson, 50 F. (2d) 646, was appealed to this court from Idaho. The appellee was sick in France and confined in hospital; at the time of his discharge no rating of disability was made, but after reaching his home he was in poor physical condition. He was given employment with the Forest Service, experienced great difficulty in doing his work in telephone maintenance and in doing the necessary horse back riding; he was transferred to clerical work with the Forest Service, but was discharged on account of his inability to lift implements around the office. He then secured appointment as a postmaster, but was compelled to hire some of the work done around the post office.

During all this period, he was in receipt of fairly good wages. The government contended, as it contends in the present case, that the evidence was not sufficient to show total and permanent disability while the policy was in force. This court, in its opinion, showed the falsity of the government's contention. To quote from the opinion, commencing on page 651:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."

The court then quotes with approval from United States v. Godfrey, 47 F. (2d) 126, 127, a Massachusetts case, as follows:

> "If such claimants are able to follow gainful occupations only spasmodically, with frequent interrup-

tions due to disability, they are entitled to recover under the act.

"The evidence not only showed that Godfrey did follow 'only spasmodically' his 'gainful occupation,' but that he was 'able' to do less than he actually did —that he went to his place of employment when (as the jury may well have found) he was not 'able' so to do.

"The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. (Citing cases.) To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment congress intended to bestow on our war victims." (Citing cases.)

The court further quotes with approval from Carter v. United States, 49 F. (2d) 221, 223, a North Carolina case, as follows:

"The mere fact that a claimant may have worked for substantial periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked, but whether he was able to work, i. e., whether he was able to follow continuously some substantially gainful occupation without material injury to his health. Of course, the fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability; but the fact that he works when physically unable to do so ought not to defeat his right to recover if the jury finds that such disability in fact existed"

The court also quotes with approval from United States v. Phillips, 44 F. (2d) 689, 691, a Missouri case, as follows:

> "The government contends that the evidence of his working is so overwhelming that the court should have given a peremptory instruction to the jury. If the mere fact that the insured did work is conclusive evidence that he was not permanently and continuously disabled, then there should have been no recovery on this policy. The term 'total and permanent disability' does not mean that the party must be unable to do anything whatever; must either lie abed or sit in a chair and be cared for by others, (citing a quotation from United States v. Sligh, heretofore cited in this brief). Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so."

We have taken the liberty of quoting freely from this decision, as it indicates that this court is not alone in the principles applied to this class of cases.

The present case is similar in many respects to the Lawson case—(Lawson was sick in service) appellee was wounded in action, he was rated as disabled at time of discharge, which did not apply to Lawson, he was in bad physical condition upon his discharge, was discharged from some positions, could only hold the position at the Ferndale by reason of the fact that others assisted in doing por-

tions of the work, and in addition was compelled to pay other employees to do some of his work at the Ferndale, at times when his condition would no longer permit his continuing on the job.

In the recent case of Sorvick vs. United States, 52 F. (2d) 406, appealed to this court from Idaho, the trial court directed a verdict in favor of the government, the trial court seemingly influenced by the insufficiency of the testimony of the two physicians who testified for the appellant. This court, in its opinion, refers to the fact that, in addition to the testimony of the physicians, considerable evidence was presented by lay witnesses, including the appellant, showing difficulty in doing any work, and the court holds that quite aside from the conflicting medical testimony, the plaintiff's own testimony on the stand would tend to establish that he was totally and permanently disabled.

In the instant case there is no conflict in the medical testimony—all doctors agree that Francis was disabled, the only point of difference being the extent of the disability, and in addition the testimony of the appellee and other lay witnesses show conclusively his inability to continuously follow any gainful occupation.

Numerous other cases could be cited, but we believe that these already cited are sufficient to demonstrate that the facts in this case justified submission to the jury, and, therefore, we will not burden the court with other citations.

At this time, we take the opportunity to examine the cases cited by the appellant in its brief on this division of the case.

The case of United States v. Griswold, 61 F. (2d) 583,

was appealed to this court from Oregon, it being one of the most recent decided by this court. The evidence showed that the appellee worked for long periods of time, but was only able to do so with extreme difficulty, and the court holds that the matter was properly submitted to the jury, the following quotation forming the last paragraph of the decision:

> "At the argument we were impressed that the case was controlled by the above cited cases, but a study of the briefs and record convinces us that there was substantial evidence to go to the jury upon the proposition that although plaintiff actually worked for long periods of time, he was not then able to do so nor to do so continuously, and that the case is ruled by our decision in U. S. v. Sligh, 31 F. (2d) 735; U. S. v. Meserve, 44 F. (2d) 549; U. S. v. Rasar, 45 F. (2d) 545."

United States vs. Kerr, 61 F. (2d) 800, appealed to this court from Oregon, presents an entirely different state of facts from the instant case. Kerr claimed injury from which he never recovered, that the injury caused stiffness of the knee, testified to many places of employment, both in vocational training and after that training, that he was employed as a watchman, the evidence showing he was able to do the work required without assistance, his evidence being that he could not walk without limping. The present case is entirely different—Francis was injured by shrapnel being driven through his body, this was followed by months of hospital treatment, with a pus condition of the lungs, and a history of casual employment and repeated discharges after his service, except on the one job where

other employees assisted him in his work; not only that, but the vocational training board found it necessary to change his objective twice while he was in training. In addition, the medical testimony in the Kerr case was inconclusive, the only doctor testifying having met Kerr approximately ten years after his injury, had made statements before the trial contradictory to the statements he made at the trial, and his testimony, to show that the alleged disability dated back to the date of injury, being based on a hypothetical question, which the court points out was not predicated upon the evidence in the case and assumed conditions not shown by the evidence—in the present case, two doctors, who had Francis under observation from 1921 to the date of the trial, testified, and in addition Dr. Treacy, consulting surgeon for the bureau, who had heard all the evidence in the case, testified, basing his statements upon all of the evidence, and the doctors for the appellant all joined in testifying that Francis was disabled, the only point of difference being the degree thereof. The court in its opinion was speaking only of the peculiar facts shown by Mr. Kerr and his witnesses. To quote:

> "The subsequent employment for the periods covered, in the absence of evidence of **inability** to work—not merely unemployment, and the nature of the injury complained of, refutes the idea that appellee was totally and permanently disabled at the date of discharge. (Citing cases.) And emphasis is further given to this fact by the doctor as to his ailments **at the time of the examination more than eleven years after the discharge when the disclosed condition was**

present, attributing the ailment to **sciatica.**

The court then points out that there is no evidence showing any infection of this knee at any time since injury, nor testimony of any condition believed to be neurosis, nor is there evidence that the injury to the knee cap caused injury to the sciatic nerve and caused the condition which the doctor testified he described in the letters to the hospital. In short, the case turns upon the question of the lack of showing of material matters by the evidence, a condition not present in the instant case.

United States vs. Thomas, 53 F. (2d) 192, a case in the Fourth Circuit, appealed from South Carolina, shows that, as a result of a wound received in action, there was a disability of the left fore arm, that some of the bones of the wrist and the third finger of the right hand had been removed, and that the lower teeth of the right lower jaw were gone and the bone somewhat distorted. Thomas' family physician in testifying said the chief disability was the atrophic condition of the left arm, which greatly handicapped its use, and that in his opinion Thomas could not continuously do any kind of manual labor, requiring the use of the left arm, but said, however, that he was not totally disabled from following other occupations or lines of work, and the doctors for the government were agreed that many kinds of work of a substantially gainful character, such as telephone operator, salesman, manager of filling stations, etc., were open to him. In the instant case, it will be remembered that Francis was not able to do clerical work during his vocational training, was taken off study by the Vocational board, was placed in training as a

baker, where he was unable to do the laboratory work; in short, although he has tried to do both sedentary and laboring work, he has not been successful in continuously doing so, and the evidence is silent of any statement by any doctor of any type of work which he could continuously follow. It is interesting to note that Judge Northcott dissents from the majority opinion in the Thomas case and states that in his opinion there was ample evidence to take the case to the jury.

In United States v. Harth, 61 F. (2d) 541, appealed to the Eighth Circuit from Iowa, the evidence showed that shortly after his discharge from the army, insured worked for seven months at heavy manual labor with a plumbing supply concern, that this work caused his right leg to tire and pain him, compelling him to frequently take time off, which resulted in discharge; he then went with another plumbing supply house, where he did checking and manual labor, being employed with this concern from February, 1920, to April 1, 1926, and the treasurer of the company testified his services were satisfactory. There was no evidence on behalf of Harth that his employment was frequently of a casual nature, during rodeos, fairs and tournaments, that he was discharged from several places by reason of his inability to do the work, that the only place where he held employment, other employees jumped in and did a goodly portion of his work, and there was no evidence of disability to the heart, nerves and kidney, all of which matters appear in the instant case. Even with these matters not apparent in the testimony, the court says, page 543:

"There is in the testimony serious dispute as to

whether the injury of which appellee complains is permanent, or, at least, was permanent, in its earlier stages; but we believe that the evidence on this phase of the controversy was so far conflicting as to render the finding of the jury thereon final and conclusive. * * *

"It has been pointed out that, under certain conditions, the fact that a claimant may have worked for substantial periods during the time of claimed total disability is not necessarily conclusive against him. (Citing cases.) 'Continuously' means with reasonable continuity and regularity, as other men normally work." (Citing cases.) P. 544.

Can it be said that Francis worked as other men normally work, when the facts disclose that the only place where he could hold steady employment, the other employees performed many of his tasks.

The court then further points out that recently manifold attempts have been made to make subsequent condition of totality or permanency relate back to a period antedating the lapse of the insurance and to quote, p. 545:

"Appeal is made to the sympathy which is quick to respond to the suffering of the soldier, particularly when its cause is of service origin. This sympathy has been expressed in those cases in which work, substantially gainful, by the insured has been excused and overlooked, where it has been deemed seriously to imperil his life or health. Typical of these are cases of tuberculars, as pointed out by Judge Hutcheson in United States v. Martin, supra. to which may be added those involving afflictions of the heart. Marsh v. United States, supra. * * *"

The evidence on behalf of Francis in the present case shows a condition of the heart, lungs, kidneys and nerves; the evidence of the physicians shows that the pus condition in the wound at the time of the injury and shortly thereafter was sufficient to produce these conditions of the heart, lungs and kidneys, and that the nervous condition is a natural result of the wound and the suffering attendant thereon, and under the rule in the Harth case was a sufficient showing to justify the trial court in submitting the issue to the jury.

In United States v. Rice, 47 F. (2d) 749, appealed to this court from Oregon, the evidence showed manual labor performed by insured for a period of five years following his discharge from the army, but the opinion is silent as to any evidence such as we have in the present case of the nature of the employment, the help he received from other employees, evidence of doctors that the work done was detrimental to the health of the insured—in short there is no similarity between that case and the present case.

In United States v. Ely, 58 F. (2d) 217, appealed to the Eighth Circuit from Missouri, the decision of the court is based solely upon the evidence of the insured, his wife and insured's employer, that at the time of the trial and for eighteen months prior thereto, the insured had been steadily employed at normal wages, and had, in the words of his employer, "performed his work there with me satisfactorily," with absence of only about a week, caused by sickness.

Eggen v. United States, 58 F. (2d) 616, in the Eighth Circuit, discloses that the insured was free from disease or disability at the time of discharge; there was testimony

that when examined in September, 1919, he had symptoms indicating incipient pulmonary tuberculosis; that he was advised to go to hospital that he might be cured; and that he failed to do so. The court rested its opinion upon the lack of evidence to show that at the time the insurance lapsed for nonpayment of premiums, there was a condition of total and permanent disability, but the facts are dissimilar from the facts in the present case, as here was sufficient to show that the wound received by Francis was the cause of his trouble, and that it was reasonably of such a nature that it would continue throughout his lifetime. The court in the Eggen case points out that incipient pulmonary tuberculosis does not always result in total and permanent disability, and that it is curable in the early stages.

Appellant argues that the testimony of the physicians is divided into two classes; that is, testimony as to facts and as to opinion; that the X-ray is a great aid to physicians, and a physician, who can testify strictly to his opinion of what exists, makes that evidence practically conclusive when he can demonstrate the existence of the condition by an X-ray picture of the impairment. This argument merely goes to the credibility and weight to be given the evidence, and the argument should be directed to a jury rather than to an appellate court, but it is interesting to note that all the physicians, who were questioned relative to the matter, stated that a heart condition would not necessarily appear in an X-ray, and Dr. Bridenbaugh, who took the only X-ray introduced in evidence, stated that a lnng condition resulting from a projectile being driven through the lung would not necessarily show in the X-ray.

Appellant further directs attention to the testimony of Dr. Allard to the effect that the X-ray taken just before the trial showed no evidence of a penetrating wound of the lung tissue, and that the X-ray indicates that the left lung is better than the right lung, forgetting that its own witness, Dr. Watters (Tr. p. 115) testified that an X-ray taken at the government hospital showed a fibrosis, which means scar tissue, from the healing of some wound in the upper lung. The only conclusion that can be drawn is that X-rays, like doctors, differ, and that one X-ray, possibly by being of a superior type or stronger power, may show conditions that will not be developed by another machine; but, again, this only goes to the weight of the testimony, a matter for the jury.

Complaint is made that Dr. Arnold gave testimony for the appellee without having official records of the examination, and this is contrasted with the evidence of government doctors, who had written records. Again this argument should be directed to the jury, not the appellate court.

The testimony of Drs. Arnold, Hanley and Treacy is held up to ridicule, and the suggestion made that the records of the Adjutant General's office were available, and the fact that they were not used indicated an attempt to prove by speculation and conjecture that, which if it existed, was readily and easily proved by concrete, reliable evidence. This evidence to which government counsel refers, was all in the possession of the appellant and was not produced—the fact that it was not produced, if in existence, by the party who had possession of it, is highly suspicious and tends to raise the impression that these records undoubted-

ly had data that would be injurious to the government in its defense to the action. But, again, this matter goes to the weight of the evidence and is properly for the jury's decision.

Appellant further states that no evidence whatever was offered by the appellee of his inability to follow any other occupation than his prewar occupation of cook and waiter, conveniently overlooking the fact that the appellee's experiences in vocational training showed that he was not fitted for clerical work or laboratory work, and that after training he had fallen down on the job when he tried to do work requiring physical effort; in short, there was a showing that he was not fitted for either sedentary or active occupations. We do not know of any other way to prove this fact, except, possibly, by calling the roll of all known occupations.

It is respectfully submitted by the appellee that on this branch of the case, the evidence showing total and permanent disability was of a substantial nature, that the trial court was justified in submitting the matter to the jury, and that the verdict of the jury should not be disturbed by this Honorable Court.

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The remaining assignments of error are directed to a question propounded to Dr. Treacy (Tr. p. 97) by the Presiding Judge.

We confess that we are unable to understand the argument of appellant and just what error is claimed to have been committed. The appellant's argument rather hints at two propositions—first, that the question was improp-

er, and, second, that it in effect was a charge to the jury as to the definition of total and permanent disability.

The question is not an improper one—the elements going to make up the question all appeared in the evidence, and no objection was made by appellant's counsel that it was not a correct recital of the facts that had been shown in the previous testimony, neither did appellant's counsel ask any further questions based upon any facts that might have been omitted from the question propounded by the trial judge. The questions that appellant's counsel had been propounding previous to this question of the trial judge were of a hypothetical nature, but did not include, or pretend to include, a full and fair statement of all the evidence upon which Dr. Treacy was expressing an opinion.

The jury could not have been mislead by this question, as the court explained (Tr. p. 98): "Well, we will have to put the evidence in there. We are putting a hypothetical question that the jury may have the benefit of expert testimony, and the jury may have to determine that."

The jury was fully informed at the time, that the question being considered was of a hypothetical nature, and in order that there might be no misunderstanding the court in its instructions fully and fairly defined "permanent and total disability," (Tr. p. 134), instructed the jury that they were the sole judges of the effect, value and weight of the evidence, and of the credibility of witnesses, that it was solely and exclusively the duty of the jury to determine the facts, and that this must be done from the evidence presented (Tr. p. 136), further instructed the jury that in determining their verdict, they should only take into consid-

eration the testimony of the witnesses upon the witness stand and such documentary evidence and exhibits as had been admitted (Tr. p. 137), and then "By no remark by the court during the trial, nor by these instructions or otherwise, does the court or did the court express any opinion as to the facts in the case. It is for you and not the court to determine what the facts are."

The cases cited by appellant under these assignments are not authority and can not be construed as authority that the court erred.

Order of the United Commercial Travelers v. Nicholson, 9 F. (2d) 7, involved an accident policy, and the court in the formal charge commented on certain testimony, but ignored other testimony, and the case was reversed for error in the formal instructions; in Cummings v. Penn. Ry. Co., 45 F. (2d) 152, the court was also considering the formal instruction.

It is thus to be seen that cases cited by the appellant under these specifications have to do with the formal instructions of the trial judge, and not one case is directed to a circumstance where the trial judge asks some question based upon the evidence in the case.

It is a rule apparently without exception in both Federal and State courts that the court has the inherent right to participate in the examination of witnesses, to elicit any evidence to show the truth; he is not a mere moderator, but has active duties to perform to see that the truth is developed, and in his discretion he may ask questions to elicit material evidence; many cases could be cited, but the following are illustrative of the principle:

Kettenback v. U. S., 202 F. 377, 385.

Edwards v. Seattle R. & S. Ry., 113 Pac. 563, 62 Wash., 77.

Dutton v. Territory, 108 P. 224, 13 Ariz. 7.

State v. Keehn, 118 Pac. 851, 857, 85 Kan. 765.

An interesting case in which the trial judge took a much more active part in the trial of the action is Brank v. United States, 60 F. (2d) 231, and the appellate court ruled that the trial judge was within his rights.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

PHILIP SAVARESY,

GEORGE S. SMITH,

Attorneys for Appellee.